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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1992

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA, et al.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC., IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICI

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae on behalf of itself and the Associated General Contractors of California, Inc. (AGC California), in support of petitioner Northeastern Florida Chapter of the Associated General Contractors of America (AGC). Written consent to

the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy for PLF is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

AGC California is a nonprofit California corporation whose members include general contractors and subcontractors in the construction industry in California. AGC California has as one of its principal aims and objectives the establishment and maintenance of fair and non-discriminatory competitive bidding practices for public construction projects. AGC California is the plaintiff in a lawsuit pending in the United States District Court for the Northern District of California against the City and County of San Francisco which involves issues similar to those presented in this case.

PLF has participated in cases which involved issues similar to those presented in this matter. The Foundation's public-policy perspective and litigation experience in support of individual liberties will help provide this Court with additional argument with which to view the threat to civil rights posed by the Eleventh Circuit's ruling in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 951 F.2d 1217 (11th Cir. 1992).

STATEMENT OF THE CASE

This case presents the issue of whether an association, whose members are precluded from bidding on certain municipal contracts by a set-aside program, must show that specific contracts would have been awarded to its members but for the existence of the set-aside program in order to have standing to challenge the program.

AGC filed a verified complaint in the United States District Court for the Middle District of Florida on April 4, 1989, seeking declaratory and injunctive relief against the City of Jacksonville (City). AGC, on behalf of its members who "regularly bid on and perform construction work for the City of Jacksonville," Complaint at ¶ 9, challenged the minority business enterprise (MBE) program of the City as violative of the Equal [illegible]ion Clause of the Fourteenth Amendment and 42 U.S.[illegible] § 1981 and 1983. The MBE program sets aside 10% of the dollar amount of city contracts to be bid on and awarded solely to minority-owned business enterprises.

After the District Court issued a temporary restraining order and a preliminary injunction, the Eleventh Circuit reversed the District Court. *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Florida*, 896 F.2d 1283 (11th Cir. 1990) (*Northeastern I*). One member of the panel opined in

concurrence that AGC lacked standing to bring the action. *Id.* at 1287 (Tjoflat, C.J., concurring).

On May 31, 1990, AGC prevailed on cross-motions for summary judgment, the District Court finding the City's program constitutionally infirm under *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). On appeal, the Eleventh Circuit dismissed the action without prejudice for lack of standing, *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Florida*, 951 F.2d 1217 (11th Cir. 1992) (*Northeastern II*), based on AGC's alleged failure to demonstrate that "but for the program, any AGC member would have bid successfully for any of these contracts." *Id.* at 1219.

SUMMARY OF THE ARGUMENT

An association need not show that one of its members would have been awarded a particular contract absent an MBE set-aside program in order to facially challenge the ordinance establishing the MBE program.

To exclude contractors from bidding on contracts due to their race is to inflict a direct, personal injury upon those contractors regardless of whether any of them would otherwise be awarded a contract that was set aside. A law directed at a certain group and denying that group the opportunity to bid on contracts injures the targeted group whenever a contract is set aside. If the targets of the law seek neither money damages nor the award of a specific contract, they should not have to prove they would have received a specific contract to have standing to challenge the law on its face.

The very existence of the law barring its participation constitutes an actual, present harm to the excluded party. Requiring a party to prepare a bid for a contract that it is barred from bidding upon is to demand a costly and futile effort that ignores the injury inflicted upon those who are deterred from bidding. The fact that the party challenging the set-asides bids on and performs contracts for the city that are not set aside, but is expressly precluded from bidding on the set-asides because of race, is enough to establish standing for a facial challenge.

ARGUMENT

I

CONTRACTORS PRECLUDED FROM BIDDING ON PUBLIC CONTRACTS ON THE BASIS OF THEIR RACE HAVE STANDING TO FACIALLY CHALLENGE THE DISCRIMINATORY ORDINANCE

The Fourteenth Amendment commands: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1.[1] Actions brought under 42 U.S.C. § 1983 to vindicate this right to equal protection are not the special province of any particular racial or ethnic group. It has long been established that the guarantees of the Fourteenth Amendment "are universal in their application, to all persons . . . without regard to any differences of race, of color, or of nationality." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

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[1] Municipal ordinances are considered state action for purposes of the Fourteenth Amendment. *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938).

The City ordinance that is the subject of the suit at bar unquestionably treats individuals differently based on their racial status. This Court has held that the stigma of being a member of a race that is subject to unequal treatment is not enough to confer standing on an individual who is not personally subject to this treatment. *See Allen v. Wright*, 468 U.S. 737, 755 (1984). The Eleventh Circuit decision presumes, however, that the very group singled out for unequal treatment, nonminority contractors who bid on public contracts, does not suffer sufficient harm to challenge the discriminatory ordinance on its face.

Standing doctrines are supposed to ensure that an Article III case or controversy exists that is suitable for adjudication, reserving court resources for parties with more than a general or academic interest in a legal issue. The constitutional component of standing requires that a plaintiff "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751. The injury in fact must be "'distinct and palpable,' as opposed to merely '[a]bstract,' and the alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (citations omitted). These requirements have been satisfied by AGC.

A. Race-Based Deprivation of the Opportunity to Compete Is a Distinct and Palpable Personal Injury

AGC has challenged the MBE program as facially unconstitutional, incapable of being applied in a manner consistent with the Fourteenth Amendment. No particular set-aside need be identified, for every set-aside would inflict injury. This injury results from a government prohibition on participation in a bidding process solely on the basis of a prospective bidder's race. AGC seeks, via injunctive and

declaratory relief, to protect the right of its members to compete free from racial discrimination.[2] No damages, nor award of specific contracts, are sought.

The Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, recognized that racial set-asides inflict injury regardless of whether any individual had a right to be awarded any particular contract. Although *Croson* involved a situation in which the set-aside requirement prevented Croson, the only firm submitting a bid, from being awarded a public contract, five members of the Court defined the constitutional right at risk in terms of process and opportunity rather than the right to be awarded a particular contract. Justice O'Connor, writing for herself, the Chief Justice, and Justices White and Kennedy explained, "[t]he Richmond Plan denies certain citizens *the opportunity to compete* for a fixed percentage of public contracts based solely upon their race." *Id.* at 493 (emphasis added) (opinion of O'Connor, J.). In a special concurrence, Justice Scalia added, "the appellee here had a constitutional right to have its bid *succeed or fail* under a decisionmaking process uninfected with racial bias." *Id.* at 528 (Scalia, J., concurring in the judgment) (emphasis added).

This Fourteenth Amendment right to compete has been recognized by the Court in another important context. In *Regents of the University of California v. Bakke*, 438 U.S.

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[2] A group seeking to derive an action out of the interests of its membership must establish that (1) its purpose is related to the affected interest; (2) an individual member has standing to bring the suit; and (3) the individual member is not indispensable to the suit. *See Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). AGC meets each of these standards.

265 (1978), the standing of an applicant to the University of California at Davis Medical School did not turn on whether he would have been accepted but for the program. A majority of the Court concluded

> even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. The constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim .... The trial court found such an injury, *apart from failure to be admitted*, in the University's decision not to permit Bakke *to compete* for all 100 places in the class, simply because of his race .... Hence the constitutional requirements of Art III were met. The question of Bakke's admission vel non is merely one of relief.

Bakke, 438 U.S. at 280 n.14 (opinion of Powell, J., joined by Brennan, White, Marshall, Blackmun, JJ., 438 U.S. at 328) (emphasis added).

The other four members of the Court based their decision solely on Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*; *Bakke*, 438 U.S. at 412 (Stevens, J., concurring in the judgment in part and dissenting in part), which expressly makes being "excluded from participation in" a program that receives federal assistance a cognizable injury. A majority of the Court, however, found the harms outlawed by Title VI to be coextensive with the Equal Protection Clause of the Fourteenth Amendment thus recognizing that being barred from competition is a potential Fourteenth Amendment violation. *See Bakke*, 438 U.S. at 287 (Powell, J.); *id.* at 325 (Brennan, White, Marshall, and Blackmun, JJ.).

It is particularly harmful for a contractor to be subject to such exclusionary laws for the pursuit of a lawful profession is a fundamental right, *Truax v. Raich*, 239 U.S. 33, 41 (1915); *Meyer v. State of Nebraska*, 262 U.S. 390, 399 (1923). The circumscription of this right on the basis of race implicates a distinct and direct constitutional injury.

B. The Success of a Bid Is Irrelevant to a Facial Challenge to a Racially Discriminatory Program

There is nothing wrong with phrasing the test of injury for standing purposes in terms of "but for" causation. The Eleventh Circuit, however, reviewing a facial challenge by a party that seeks no damages, has posed a completely irrelevant question. In light of *Croson* and *Bakke*, the more appropriate question is whether "but for the City's program, the association's members would be allowed to compete for contracts set aside by the City."

The inappropriateness of the "but for" question actually posed by the Eleventh Circuit in the opinion below is exposed by tracing its dubious pedigree within that Circuit. It first surfaced in the unremarkable context of the elements necessary for a court to award a specific contract, *Choctaw Manufacturing Co. v. United States*, 761 F.2d 609, 619 (11th Cir. 1985), then was used to deny standing when a claim for lost profits failed to specify particular contracts lost, *S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752 (11th Cir. 1991). In *The Cone Corp. v. Florida Department of Transportation*, 921 F.2d 1190 (11th Cir. 1991), the case the *Northeastern II* court said "barred" it from finding standing, 951 F.2d at 1219, the Eleventh Circuit used legalistic legerdemain to find a facial attack unwarranted. *Cone Corp.* ruled out the possibility that the government official in question could violate the Fourteenth Amendment because "his oath of office . . . requires him to avoid such

unlawful conduct." *Cone Corp.*, 921 F.2d at 1207. Commentators have rightly described this a "particularly virtuosic display of artistry," Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d, Pocket Part § 3531.4 at 134 n.3.6 (1992). The absence of specific contracts identified to support an *as applied* challenge, coupled with the court's willing suspension of disbelief concerning the propensity of a government official to violate his oath of office, resulted in a finding of no injury on which to base standing.

It is a rather large and unwarranted leap from this history to require proof that a particular contract was undeservedly lost when a party makes a facial challenge to an ordinance. The injury supporting standing for a facial challenge need be no more than a showing that the provision attacked would injure, by its very terms, the party seeking declaratory and injunctive relief. The verified complaint makes plain that AGC's members are in the construction industry, have obtained contracts from the City in the past, and are barred solely on the basis of their race from consideration for contracts that are set aside under the challenged ordinances.[3] AGC is harmed by each contract

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[3] Amici are aware that the City has, effective October 28, 1992, replaced the MBE program herein challenged with one that sets distinct goals for black- and women-owned businesses, eliminates preferential treatment for other groups, and authorizes subcontractor participation and bid preferences in addition to set asides. The City cannot, merely by placing more discriminatory arrows in its quiver and redefining the privileged class, evade facial challenge of a set-aside program. This is a classic example of an injury that would be "capable of repetition, yet evading review" were the Court to consider AGC's challenge mooted. *Southern Pacific*
(continued)

for which its members, despite being competent participants in the industry, are not allowed to compete solely because of their race.

C. The Excluded Contractors' Injury Is Neither Hypothetical nor Conjectural But Is Actual and Imminent

While there are, of course, economic consequences when individuals are barred from competing for public contracts due to their race, the personal injury inflicted can also be considered noneconomic in nature. Noneconomic injury can be the basis for standing. See *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686 (1973).

The Eleventh Circuit is plainly wrong in asserting that AGC "has not alleged specific noneconomic harm either." *Northeastern II*, 951 F.2d at 1220. AGC's verified complaint alleges "[n]umerous non-minority members of Plaintiff AGC would have been eligible to, and would have, bid on such designated set aside contracts but for the restrictions imposed" by the City. Complaint at ¶ 46. Being barred from consideration in bidding on the basis of race is itself an injury, regardless of the outcome of the bidding. *See Croson*, 488 U.S. at 493 (opinion of O'Connor, J.); *id.* at 529 (Scalia, J., concurring in the judgment); *cf. Bakke*, 438 U.S. at 280 n.14 (opinion of Powell, J.).

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[3] (continued)
Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911). *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288-89 (1982) (city's repeal of a challenged provision does not moot controversy).

The injury of exclusion is not confined to business or education. In *Carter v. Jury Commission of Greene County*, 396 U.S. 320, 329 (1970), the Court found standing for people excluded from the jury rolls based on their race. Standing was "bottomed on the simple proposition that the State, acting through its agents, has *refused to consider* the appellants for jury service solely because of their race." *Id.* at 330 (emphasis added).[4] The appellants were not required to show that they would have been selected for any particular jury.

AGC's case is distinguishable from other noneconomic harm cases in which the Court had found a lack of standing. In *Lujan v. National Wildlife Federation*, 497 U.S. ___, 111 L. Ed. 2d 695 (1990), an organization lacked standing to challenge an agency decision which had the effect of *permitting* third parties to undertake mining activity. The National Wildlife Federation (NWF) failed to specify what areas of the vast tracts of land in question were actually used by their members making it impossible for a court to determine whether the permitted activity would in fact harm NWF. *National Wildlife Federation*, 111 L. Ed. 2d at 716. By contrast, AGC's harm is from the absolute bar to competition its nonminority members face whenever a City contract is set aside. AGC is making a facial challenge to an ordinance that by its very terms excludes certain of its members.

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[4] There is a long history of challenges to the racial composition of juries on the part of criminal defendants, *see, e.g., Sims v. Georgia*, 389 U.S. 404 (1967). Application of the Eleventh Circuit rule herein challenged would absurdly base standing on a required showing that, "but for the exclusion of members of his race from the jury, petitioner would have been acquitted."

In this vein, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), shows that proof that a particular construction contract will be awarded is not necessary to meet constitutional standing requirements. Although a number of market contingencies affected whether a housing proposal would see the light of day, "[t]he challenged action of the petitioners stands as an *absolute barrier* to constructing the housing [petitioner] had contracted to place on the [proposed] site. If [petitioner] secures the injunctive relief it seeks that barrier will be removed." *Id.* at 261 (emphasis added). Although "[a]n injunction will not, of course, guarantee" that a contract affected by other contingencies will be completed, the party seeking to construct the housing had standing to challenge the absolute bar. *Id.* The bar itself constitutes a present and on-going injury.

This is not a case in which standing is undermined by uncertainty concerning the prospects of injury. The Court in *Lujan v. Defenders of Wildlife*, 504 U.S. ___, 119 L. Ed. 2d 351 (1992), found that a lack of "concrete plans" to visit foreign lands indirectly affected by the challenged government action rendered the injury complained of neither actual nor imminent. *Defenders of Wildlife*, 119 L. Ed. 2d at 366-67.

Parties in the position of AGC's members, however, can hardly make their plans more concrete--they are located in and perform contracts for the very City that excludes them from contracting opportunities. The affected activity in AGC's case is the very activity that puts bread on the tables and roofs over the heads of its members. The nonminority contractors in AGC suffer an injury not "at some indefinite future time," *id.* at 367 n.2, but rather *every time* the City sets aside a contract on the basis of race. AGC faces an absolute bar and is injured whenever one of its members is

told by the City not to bother submitting a bid. Although AGC's members are not even allowed on the playing field, the Eleventh Circuit demands to know their score.

II

PREPARING A BID WHEN ONE IS EXCLUDED FROM COMPETITION IS FUTILE AND IS THUS NOT REQUIRED

The only way a party could satisfy the Eleventh Circuit test for standing would be to prepare a bid for a contract that is set aside. However, the MBE program on its face would not allow AGC's nonminority members to be awarded any contracts that are set aside. The refusal of members to go through the costly and time-consuming process of preparing a bid for a project that cannot by law be awarded to them should not deny them standing to seek injunctive and declaratory relief. As the Court stated in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365-66 (1977): "When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application."

Teamsters answered the issue in this case in the clearest possible terms. "If an employer should announce his policy of discrimination by a sign reading '[Non-]Whites Only' on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs." *Id.* at 365. Although *Teamsters* was a case under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, its rationale applies equally in this case. *See also Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977); *Berkman v. City of New York*, 705 F.2d 584, 594 (2d Cir. 1983) ("[t]hose who have been deterred by a

discriminatory practice from applying for employment are as much victims of discrimination as are actual applicants whom the practice has caused to be rejected").

The performance of a futile act has not been required to establish standing for facial challenges to laws in other settings. Owners of a well located in Nebraska challenged on Commerce Clause grounds a law that prohibited them from transporting their water for use on their adjoining tract of land, inside the Colorado border. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982). Although the challenged law provided for permits to be issued if the state where the water is to be used grants reciprocal rights, Colorado did not grant these rights. *Id.* at 944. The Court held that, "appellants would not have been granted a permit had they applied for one. Their failure to submit an application therefore does not deprive them of standing to challenge the legality of the reciprocity requirement." *Id.* at 944 n.2. *See also Nyquist v. Mauclet*, 432 U.S. 1, 6 n.7 (1977) ("little is to be served by requiring [plaintiff] now to go through the formality of submitting an application for a loan, in light of the certainty of its denial").

CONCLUSION

It has been nearly four decades since the pernicious "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), was put to rest by the Court in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). The Eleventh Circuit decision would turn back the clock to the days when distinctions based on race were presumed valid by insulating from facial challenges government enactments that discriminate on the basis of race.

There is a distinct, personal injury to an individual who is told he need not bid for contracts because he is of the wrong race, and this injury exists regardless of whether he would ultimately be awarded the contract. The problem is with the process as much as the result. When participants in a particular industry are singled out for discrimination based solely on their race, the association that represents their interests should have standing to challenge the law that, on its face, inflicts the race-based injury. The decision of the Eleventh Circuit denying standing to challenge the racially exclusionary policies of the City of Jacksonville should be reversed.

DATED: November, 1992.

Respectfully submitted,

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